STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Whitbeck, P.J., and Smolenski and Cooper, JJ.

PAUL DRESSEL and THERESA DRESSEL,

Plaintiffs-Appellees,

v

AMERIBANK,

Defendant-Appellant.
/

Supreme Court Docket No. 119959

Court of Appeals Docket No. 222447

Kent County Circuit Court
No. 98-013017-CP

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Plaintiffs, and to a lesser extent the State Bar, address issues of significance to the bar, to the bench, and to the public – but of little significance to this case. By ignoring the difference between preparing a document for oneself as opposed to another, and what the bank actually did with the forms in this case, Plaintiffs attempt to create the impression that a ruling for AmeriBank will open the floodgates and permit unauthorized and untrained persons to hold themselves out as counsel, and reward the public with shoddy work. But this case does not involve the preparation of documents for another person, does not involve claims that AmeriBank held itself out as representing the interests of borrowers, does not involve any advice to the borrowers, does not involve discretionary acts with legal overtones, and does not involve claims of shoddy service. In fact, the Court of Appeals' decision would do nothing to prevent any of that – it would just prohibit the charging of a "separate fee" for doing so.

AmeriBank respectfully submits that this case need not resolve all conceivable issues concerning the unauthorized practice of law. The issues of this case are limited. The Michigan statute prohibits only the practice of law for another, and AmeriBank simply has not represented any interests other than its own. In any event, what AmeriBank does with the forms cannot be considered the practice of law since it involves no discretionary act on the part of bank employees, and no advice to the bank's borrowers. AmeriBank did not engage in the unauthorized practice of law, and the decision of the Court of Appeals to the contrary must be reversed.

ARGUMENT

I. FILLING IN BLANKS ON STANDARD MORTGAGE FORMS DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.

A. There Is No Evidence that AmeriBank Did Anything Other than Fill in Blanks on Standard Mortgage Forms.

This case was described by the Trial Court as one in which:

> Plaintiffs do not contend that defendant does anything related to the management and/or presentation of a case in court. Nor do plaintiffs claim that defendant gives any legal advice. Instead, defendant only completes standardized forms by filling in the blanks. It does not assess the legal effect of the information placed therein, nor does it give any advice regarding those documents or their effects.

(Emphasis added.) (Op at 4, Appellant's App at 31a.) The State Bar essentially agrees that if the case is as above described, what the bank does is not the practice of law. (State Bar Amicus Br at 11.) Now, however, Plaintiffs argue – for the first time in this case – that the documents in question are not standard documents, and that AmeriBank actually added provisions to mortgage documents during the course of loan processing.[1] Plaintiffs' new contention is apparently accepted as established fact in the amicus brief submitted by the State Bar, and is the key ingredient in its argument. In fact, there is no record evidence that AmeriBank added any provisions, and it is simply not true, as a number of pieces of record evidence demonstrate.

Plaintiffs contend that the Dressels' mortgage form[2] was not uniform because AmeriBank added the "non-uniform covenants" found on the final page of the mortgage. The State Bar accepts that contention as a fact, but the only factual support it references is the

[1] Below, Plaintiffs described "the heart of this case" as being "AmeriBank's policy and practice of charging borrowers a fee of $400 for the 'service' of filling in blanks on computerized loan closing forms." (Br Supp Pls' Mot for Class Cert at 1; Appellants' Court of Appeals Br on Appeal at 1.) Plaintiffs' brief on appeal in this Court is the first mention of non-uniform covenants.

[2] Plaintiffs state that there is no evidence that AmeriBank's mortgage forms were standard FNMA forms. The very first page of the Dressels' mortgage, however, states expressly that it is the "Michigan-Single Family-FNMA/FHLMC UNIFORM INSTRUMENT." (Mortgage, Appellant's App at 9a.)

deposition testimony of Lee Pankratz at pages 66 through 68 (Appellees' App 34b). *See* State Bar Br at 16. Nowhere on these pages, however, does Mr. Pankratz state or even imply that non-uniform covenants, or any other provisions, were ever added to otherwise uniform documents by AmeriBank employees. Pankratz's Affidavit actually expressly contradicts such a position, stating at paragraph 7 that AmeriBank employees "are not at liberty to change the standard terms of the documents." (Affidavit of Lee Pankratz ¶ 7, Appellant's App 24a.)

For their part, Plaintiffs rely only on the fact that the covenants in question are titled "non-uniform" to support their contention that AmeriBank must have added them, and that there are numerous forms on the FNMA website they could have chosen. A visit to the very FNMA website cited by Plaintiffs themselves (*see* Appellees' Br at 16 n 11), however, reveals that Form 3023, the form used in this case, is the standard form of a Michigan single-family home mortgage, and that this standard form contains the very "non-uniform" covenants Plaintiffs point to.[3] Non-uniform covenants are added by FNMA in order to account for differences in state law. Whatever the case, the covenants were certainly not added by AmeriBank.

Neither the last-minute slide in Plaintiffs' position nor the State Bar's acceptance of Plaintiffs' liberty with the record should distract the Court. The conduct at issue in this case is nothing more than filling information into blanks on standard, preprinted forms, and the question that must be decided is whether that conduct constitutes the practice of law. AmeriBank did not draft any legal documents, nor did it ever give any legal advice to Plaintiffs or any other borrower about the forms they were signing. As the Trial Court found, filling in blanks on form documents requires no legal training or knowledge. (Op at 4, Appellant's App at 31a.) Filling in blanks on standard forms does not constitute the practice of law.

[3] *See* form located at http://www.efanniemae.com/singlefamily/pdf/3023.pdf. The form itself has changed slightly from the form used in 1999, but the "non-uniform covenants" remain essentially the same.

B. The Pro Se Exception Applies When a Party Actually Acts on Its Own Behalf, and Not When One Is Merely Interested in a Transaction.

The unauthorized practice of law statute allows for two circumstances in which conduct that might otherwise be characterized as the practice of law is permitted. Both Plaintiffs and the State Bar confuse, and ultimately merge, those two situations, but they are separate situations, readily distinguishable. The unauthorized practice statute that applies to corporations provides that "[i]t shall be unlawful for any corporation or voluntary association to practice . . . as an attorney-at-law for any person other than itself...." MCL 450.681 (emphasis added). The statute further states that it "shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute...." *Id.* (emphasis added).

It is the first of these provisions that constitutes "pro se" representation. It is not unlawful for a corporation to represent itself, as opposed to a person other than itself. This is the very meaning of "pro se": "for one's own behalf." Black's Law Dictionary, 6th ed at 1221. Plaintiffs complain that AmeriBank has drawn meaningless distinctions between a party to a transaction and someone who is merely interested in the transaction. For purposes of determining whether a party is acting pro se (for one's self) or instead for a person other than itself (in potential violation of the unauthorized practice statutes), the distinction is not meaningless: it is of critical importance under the statute.

Plaintiffs and the State Bar ignore this provision in the statute, and erroneously characterize the second of the provisions cited above – whether or not a corporation is engaged in a business authorized by statute – as the pro se exception. They proceed from this erroneous characterization to argue that what they describe as the pro se standard is set forth by this Court's prior decisions, *Ingham County Bar Association v Walter Neller Co*, 342 Mich 214; 69 NW2d

713 (1955), and *State Bar of Mich v Kupris,* 366 Mich 688; 116 NW2d 341 (1962), and requires that conduct be incidental to one's business and that no charges be assessed. As explained at length in AmeriBank's principal brief, however, those cases are about realtors who are not parties to a conveyance but only prepare documents for a conveyance.[4] Because it is not a party to the transaction, a realtor cannot be representing itself. These cases relied upon by Plaintiffs and the State Bar have to do with an entirely different issue: whether conduct that could arguably be characterized as the practice of law is merely part of a corporation's lawful business, and therefore permissible under that second provision of the statute.[5]

Whether or not a corporation is acting "pro se" – for oneself – does not turn on whether the corporation is "interested in" the transaction or whether it charges a fee. The question is simply whether the corporation is acting on its own behalf, or on behalf of another. All of the evidence in this case is that these documents are prepared to protect the bank's ability to enforce the repayment obligation, to comply with the federal regulations imposed on the bank, and to provide the bank with the option of later selling the loan on the secondary mortgage market. (Pankratz Aff ¶10, Appellant's App at 25a.) There is simply no evidence that AmeriBank prepared the documents on behalf of Plaintiffs. To the contrary, even Plaintiffs' Complaint alleges the opposite – that AmeriBank violated the Consumer Protection Act by "[f]ailing to reveal that the bank was preparing the 'final legal papers' for itself where it assessed

[4] *Kupris* and *Neller* therefore do not dictate, or even forecast, the result in this case. If, notwithstanding the language of the statute, they are extended to cover this case, the Court should carefully consider the arguments of amicus Huntington Bank addressing the retroactivity of such a holding.

[5] As fully explained in AmeriBank's principal brief, its conduct, were it considered to be the practice of law for another, is essential to its lending business and is therefore not the "unauthorized" practice of law by virtue of this second provision. The brief also explains why the cases relied upon by Plaintiffs do not require that no fee be charged. AmeriBank will not belabor those arguments again here, except to point out that of the 15 states Plaintiffs claim prohibit banks from charging fees for preparing documents, only one – Indiana – has actually so held.

the borrower a fee for this service...." (Emphasis added) (Compl ¶ 27(f)(ii), Appellees' App at 60b.)

Notwithstanding this admission that "the bank was preparing the final legal papers for itself," Plaintiffs now argue that mortgage documents can have an impact on the borrower's legal rights. The State Bar goes so far as to assert that the law "prohibits corporations from using non-lawyers for the preparation of documents involving the application of legal discretion, where the documents are to be signed by a party other than the corporation and affect that party's legal rights." (State Bar Br at 11.) If either of these standards defined the proper scope of the pro se exception, the exception would be virtually eliminated. After all, the business world is rife with transactions where businesses fill in standard forms that impact another's legal rights when signed by the other party. Some examples are:

Agreements for the sale of goods

Hospital forms agreeing to arbitrate claims

Forms for opening bank accounts

Apartment leases

Software licenses

Applications for insurance

Construction agreements[6]

Each of these, and many more, boilerplate forms are common. Businesses may fill in the blanks, and perhaps even add or delete provisions, which involve "the application of legal discretion." Businesses often draft their own documents for a particular transaction.

[6] The State Bar's position is also contrary to the analysis of this Court in *Detroit Bar Association v Union Guardian Trust Co*, 282 Mich 216, 229; 276 NW 365 (1937), characterizing complex construction agreements as "ordinary run of agreements in the every day activity of the commercial and industrial world," and hence not the practice of law.

Certainly, whether a form or not, the resulting document impacts the legal rights of all signers to it. Under the standard urged by Plaintiffs and the State Bar, businesses would not be able to do any of these things. Instead, they and their customers would have to hire attorneys to make any changes to forms that may have an impact on the legal rights of either party to the transaction. While such a result may guarantee full employment for lawyers, that is not the interest that the unauthorized practice statutes should be construed to advance.

C. Passing Along the Cost of Preparing Mortgage Documents Does Not Convert the Preparation Into the Practice of Law for Another.

As pointed out in AmeriBank's primary brief, the position urged by Plaintiffs and adopted by the Court of Appeals is that the question of whether a mortgage lender's preparation of documents constitutes the practice of law turns on whether the lender charges a separate fee for the preparation. Both Plaintiffs and the State Bar attempt to proffer explanations to support this illogical result, but their arguments are not supported by the record or by common sense.

The State Bar characterizes its interest in this case as ensuring that "unqualified people not provide services to the general public in circumstances that put the public's significant legal rights and interests at risk." (State Bar Br at 7.) That is certainly the interest that a case alleging the unauthorized practice of law should be designed to protect. That interest, however, is not implicated by this case. Plaintiffs do not allege that any documents were improperly prepared. The State Bar also worries that some borrowers may be misled into believing the bank was acting on their behalf; but, again, there is no such allegation in this case.[7] The State Bar's expression of concern that a mortgage company may choose the manner in which jointly owned property is titled is even further from the mark. The evidence in this case establishes that AmeriBank never prepared deeds, which are the documents that would dictate

how title is held (Deposition of Lee Pankratz at 66, Appellees' App at 34b), and in this case could not have prepared a deed because there was none; this was a refinancing – the borrower already owned the property. In short, the policy issues raised by the State Bar are the sort with which an unauthorized practice case should be concerned, but they are not issues involved in this case (and – this being a class action which all plaintiffs must be situated similarly to the plaintiff – cannot be involved here).

This is a case in which AmeriBank filled out the mortgage form for its own benefit, and did not hold itself out to be a legal advisor. Plaintiffs do not seek to halt that practice – only the separate fee. A similar claim was made in a recent Illinois case, *Michalowski v Flagstar Bank, FSB*, No 01 CV 6095, 2002 WL 113905, at *8 (ND Ill Jan 25, 2002) (attached as Addendum Tab A.) The *Michalowski* court noted first that the plaintiffs had not alleged that their lender, Flagstar, had negligently prepared their loan documents. 2002 WL 113905, at *9. The court then went on to hold that even if the plaintiffs had properly alleged negligence and damages:

> Flagstar was preparing the mortgage and note for its own benefit and incidental to Flagstar's main business, and ... Flagstar did not hold itself out to be a legal advisor or representative.

Id. at *9. The court therefore dismissed the plaintiffs' unauthorized practice claims.

Just a few weeks ago, an Illinois state circuit court reached a similar conclusion in a group of unauthorized practice cases consolidated before the Cook County Circuit Court that are virtually identical to this one. The court held that because the plaintiffs did not allege that their lenders provided any legal advice or represented that they were acting on the plaintiffs' behalf, and because there was no allegation that the defendant lenders had engaged in any

[7] The HUD pamphlet given to Plaintiffs and other borrowers encourages them to consider employing their own counsel to review closing and settlement documents. (HUD Guide, Appellees' App at 3b.)

conduct beyond that incidental to their business of mortgage lending, "the [lender's] conduct of preparing notes and mortgages in connection with plaintiffs' mortgage loans does not constitute the unauthorized practice of law." *Cortamilla v Hartland Mortgage Centers, Inc*, Cook County Cir Ct Case No 01CH17780, Aug 27, 2002 Order and Mem Op at 6 (attached as Addendum Tab B).[8]

We agree with the State Bar that if a lender represents to a borrower that it is protecting the borrower's interests or purports to offer advice as to the legal implications of a form document, and then prepares a document improperly, that might form the basis for a private cause of action for damages against the lender. In this case, however, there is no allegation, nor any evidence, of any of these things. The only thing AmeriBank did was fill in the blanks on form documents and, by all accounts, filled in those blanks correctly.

If the concern is that articulated by the State Bar – that borrowers' legal rights are at risk from improperly prepared documents – then the remedy is to enjoin the preparation of documents and require that a lawyer be hired to document and close every loan. This is not what Plaintiffs ask for, and have expressly disavowed any such charge,[9] nor is it what the Court of Appeals ordered. If the concern is instead that borrowers are paying an improper mortgage fee, then the remedy lies in a statute such as the Truth in Lending Act, which is specifically designed to regulate such matters. AmeriBank is not, and cannot be, alleged to have violated this statute.[10]

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[8] A motion to dismiss similar cases was brought before another Illinois circuit court just two months before the Cook County decision, and that court declined to decide the question on a motion to dismiss. *King v First Capital Fin Services Corp*, Rock Island Circuit Court Case No 01L-189, June 25, 2002 Order (attached as Addendum Tab C).

[9] *See* page 1 of Appellants' Court of Appeals Reply Brief on Appeal: "Appellee's Brief ... attempt[s] to recast Appellants' argument ... into one where Appellants are said to argue that lawyers must prepare all legal documents, and parties may not. Appellants Dressel make no such argument...."

[10] Plaintiffs' Brief on Appeal suggests that one risk of allowing document preparation fees is that fees so designated need not be included in the "finance charge" under the Truth in Lending Act – implying that the document fees in this case were not properly disclosed. In fact, record testimony establishes that AmeriBank

The unauthorized practice statute is not meant to supplement federal and state legislation governing mortgage fees, and this Court should not treat it as such. This case, quite simply, is not about the unauthorized practice of law.

II. THE MICHIGAN CONSUMER PROTECTION ACT DOES NOT APPLY TO THE LOANS MADE BY AMERIBANK.

Section 4(1) of the Michigan Consumer Protection Act ("MCPA") excludes the application of the Act to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1). Only three years ago, this Court interpreted this language as follows:

> [W]hen the Legislature said that transactions or conduct 'specifically authorized' by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the 'common-sense' reading of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is 'specifically authorized.' Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.

Smith v Globe Life Ins Co, 460 Mich 446, 465; 597 NW2d 28, 38 (1999). The insurance company in *Smith* qualified for the Section 4(1) exemption because it was specifically authorized to sell credit insurance under the Credit Insurance Act, which was administered by the Insurance Commissioner. *Id.* at 466. Similarly, AmeriBank qualifies for this exemption because AmeriBank "was specifically authorized by law to make loans ... and regulated by the Financial Institutions Bureau of this state as well as federal authorities...." (Op at 7, Appellant's App at 47a.)

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did include the document preparation fees in the finance charge. (Pankratz Dep at 68-69, Appellees' App at 34b-35b.)

A. The "General Transaction" at Issue in this Case is the Making of Mortgage Loans.

Plaintiffs argue that AmeriBank does not qualify for the Section 4(1) exemption because AmeriBank is not specifically authorized to practice law, and that "the Court of Appeals correctly held that when AmeriBank was preparing legal documents for a fee, it was engaged not in mortgage lending, but in the practice of law." (Appellees' Br at 31.)

To the contrary, the Court of Appeals held that AmeriBank did qualify for the Section 4(1) exemption and that the general transaction at issue was the making of loans. (Op at 7, Appellant's App at 47a.) Indeed, there can be no confusion about the nature of the "general transaction" in this case. AmeriBank made a mortgage loan to Plaintiffs. Although Plaintiffs complain about the way that AmeriBank went about making the loan, that does not change the nature of the transaction between the parties.

This Court clearly illustrated that point in *Smith*, rejecting the policyholder's argument that the allegedly fraudulent insurance practices constituted the "general transaction" at issue in the case. Rather, this Court determined that "the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'" 460 Mich at 464; 597 NW2d at 37. This Court found the insurance company to be eligible for the Section 4(1) exemption because the sale of credit insurance, the "general transaction," was specifically authorized. 460 Mich at 466; 597 NW2d at 38.

B. The Application of Section 4(1) to the Banking Industry is Not Inconsistent with Other Provisions of the MCPA.

Plaintiffs argue that Section 4(1) cannot apply to banks because that would render other provisions of the MCPA meaningless, as for example MCL 445.903(o) (prohibition against causing confusion as to terms of credit). To the contrary, there are many instances in which an extension of credit would not qualify for the exemption because the extension of credit was not

"specifically authorized" by laws administered by a state or federal regulatory board or officer, as is required by Section 4(1). For example, a retail sale on credit is subject to the Retail Installment Sales Act, but that Act is not administered by a state or federal regulatory board or officer, so the transaction would not qualify for the Section 4(1) exemption.

Second, Plaintiffs argue that MCL 445.917, which grants investigative powers under the MCPA to the Commissioner of the Financial Institutions Bureau, is inconsistent with a bank's qualification for the Section 4(1) exemption. Plaintiffs claim that "the Legislature clearly envisioned that the Consumer Protection Act would apply to banks and other lenders when it enacted, as part of the Act, Section 17 (MCL §445.917).... If the Act does not apply to banks, this language is nonsense." (Appellees' Br at 33.)

AmeriBank, however, does not argue that the MCPA never applies to banks or other lenders. Rather, AmeriBank argues that it is entitled to the exemption provided by Section 4(1), as interpreted by this Court in *Smith,* when it engages in transactions that are authorized and regulated, and not otherwise. In addition, the MCPA includes a provision virtually identical to MCL 445.917 that grants the Commissioner of Insurance the same investigative powers. MCL 445.921. If the insurance industry was eligible for the Section 4(1) exemption despite the existence of MCL 445.921 (and it clearly was under *Smith*), then the existence of MCL 445.917 certainly does not preclude the application of Section 4(1) to the banking industry.

C. The Court's Opinion in *Smith v Globe Life Insurance Company* Applies to the Banking Industry as well as the Insurance Industry.

Plaintiffs try to distinguish banks from insurance companies, arguing that the *Smith* analysis of Section 4(1) was limited to the insurance industry, which is "decidedly unlike the banking industry." (Appellees' Br at 34.) In fact, the banking industry and the insurance industry are so alike that the Insurance Bureau and the Financial Institutions Bureau were

merged into the Office of Financial and Insurance Services in 1999. As a result, both banks and insurance companies are regulated by the same agency and the same commissioner. It would be inconsistent to hold that transactions authorized by insurance laws and regulations that are regulated by the OFIS qualify for the Section 4(1) exemption, while transactions authorized by banking laws and regulations that are regulated by the OFIS do not.

AmeriBank, like the insurance company in *Smith*, is exempt from the MCPA under Section 4(1). It was authorized to make mortgage loans under the federal Home Owners' Loan Act and the Michigan Savings Bank Act, which are regulated by the Office of Thrift Supervision and the OFIS, respectively.[11] 12 USC § 1461 *et seq.*; MCL 487.3401. The Section 4(1) exemption is not available to all lenders under all circumstances, but AmeriBank does qualify for the exemption in this case. This result is consistent with other provisions of the MCPA and in accord with this Court's holding in *Smith v Globe Life Insurance Company.*

CONCLUSION

None of the evils that the "unauthorized practice of law" statute is designed to eliminate are present in this case. This is a class action, or "trial by proxy." The proxy does not involve sloppy work, plaintiffs who were led to believe the bank was their lawyer, or questionable advice on title transfer issues. It involves the refinancing of a loan, the end product of which was a FNMA form with blanks for the date, the name and address of the borrower, the name and address of the bank, the amount of the loan, and the address and description of the property taken from the deed, title insurance, or purchase agreement (none of which the bank

[11] As noted in AmeriBank's primary brief on appeal (at 25 n 5), AmeriBank was first a federal savings bank, and then a Michigan savings bank, during the period of time at issue in this case. This issue was of little or no significance until the Court of Appeals determined, without briefing or argument, that AmeriBank was not entitled to an exemption from the MCPA because it violated the Michigan Savings Bank Act. It then became important to point out that AmeriBank was not a Michigan savings bank for most of the applicable class period.

prepares). Bank employees were not authorized to make any changes to those forms, or to prepare forms of agreement to which the bank was a party. That is surely not the practice of law.

DATED: September 17, 2002

Respectfully submitted,

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ADDENDUM

A

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Tim A. MICHALOWSKI and, Meri C. Michalowski Plaintiff,
v.
FLAGSTAR BANK, FSB; and CMC FINANCIAL, LLC, Defendants.

No. 01 C 6095.

Jan. 25, 2002.

MEMORANDUM OPINION AND ORDER

HOLDERMAN, District J.

***1** On October 9, 2001, plaintiffs Tim A. Michalowski and Meri C. Michalowski (the "Michalowskis") filed a ten-count putative class action second amended complaint against defendants Flagstar Bank, FSB ("Flagstar") and CMC Financial, LLC ("CMC"). The second amended complaint purports to allege a class claim for violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a), against Flagstar and CMC in count I, a class claim for violation of the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA"), against Flagstar and CMC in count II, a class claim for breach of fiduciary duty against CMC in count III, a class claim for inducing breach of fiduciary duty against Flagstar in count IV, a class consumer fraud claim against Flagstar in count V, a class claim for restitution against Flagstar in count VI, a claim against CMC for violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1638, against CMC in count VII, a common law claim for **unauthorized practice** law against Flagstar and CMC in count VIII, a class consumer fraud claim under ICFA against Flagstar and CMC in count IX, and finally, a claim for restitution against Flagstar and CMC in count X.

On November 1, 2002, Flagstar filed a motion to dismiss counts I, II, IV, V, VI, and VIII-X of the second amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and on November 27, 2001, CMC filed a motion to dismiss counts I-III and VII-X of the second amended complaint also pursuant to Rule 12(b)(6). For the following reasons, Flagstar's and CMC's motions to dismiss are GRANTED in part and DENIED in part. Flagstar's and CMC's motions to dismiss are denied as to counts I, II, III, and IV, and granted as to counts V, VI, VII, VIII, IX, and X. Accordingly, counts V, VI, VII, VIII, IX, and X are dismissed with prejudice. Plaintiff has until February 7, 2002 to file a second amended complaint consistent with this opinion.

STATEMENT OF FACTS [FN1]

FN1. In considering the merits of a motion made pursuant to Federal Rule of Civil Procedure 12(b)(6), the well-plead allegations of the complaint must be accepted as true. *Turner/Ozanne v. Hyman/Power,* 111 F.3d 1312, 1319 (7th Cir.1997). Accordingly, the facts alleged in the Michalowskis' second amended complaint are taken as true and set-out in this opinion.

The Michalowskis are Illinois residents who obtained a mortgage loan of $127,050 to purchase a home in Ingleside, Illinois on June 7, 2001. The mortgage loan was arranged for the Michalowskis by CMC, a mortgage broker. At the time of the closing, CMC had already sold the loan to Flagstar. Prior to the closing, the Michalowskis received a loan commitment dated April 9, 2001, a preliminary Federal Truth-in-Lending Disclosure Statement dated March 15, 2001, and a good faith estimate dated March 15, 2001, all of which specified a 7.125% interest rate for the Michalowskis' loan. At the closing, on June 7, 2001, the Michalowskis were provided a note by CMC for the amount of their loan with an interest rate of 7.375%, two different Truth-in-Lending disclosure statements both dated June 7, 2001, a notice that the loan was being assigned to Flagstar, and a HUD-1 settlement statement that listed, among other things, a $400 commitment fee and a $400 processing fee paid to CMC by the Michalowskis, a $100 tax service fee paid to Flagstar by CMC, a yield spread premium of $794.06 paid to CMC from Flagstar, a $300 underwriting fee paid to Flagstar by the Michalowskis, and a $110 document preparation fee imposed by Flagstar but remitted to D.P.S., a third party document preparation service. All of the above listed fees were paid from the loan proceeds.

***2** Yield spread premiums are payments made by a mortgage lender to a mortgage broker as compensation for negotiating a loan with a

borrower. Typically, the rate of compensation is tied to the size of the loan, the interest rate the loan carries, and the time the loan closes. The higher the interest rate on the loan, the higher the yield spread premium for the broker. A yield spread premium is calculated based upon the difference between the interest rate at which the broker originates the loan and the par, or market, rate that the lender establishes. A yield spread premium allows a borrower to pay some or all of the up-front settlement costs for the loan over the life of the mortgage through a higher interest rate as opposed to paying the settlement costs from the loan proceeds. Because the mortgage that carries a higher interest rate can be sold by the lender to an investor at a higher price, the lender, in turn, pays the broker an amount reflective of this price difference. In this case, Flagstar paid CMC a .06% yield spread premium on the Michalowskis' mortgage loan based upon the .25% increase in the interest rate from 7.125% to 7.375%. The effect of increasing the Michalowskis' mortgage loan interest rate by .25% on the Michalowskis' 30-year mortgage was to increase the finance charge by more than $6 per $100 of amount financed. For a $123,250 loan, this would result in over $5,000 in extra finance charges. At the time of the closing, the Michalowskis did not understand the effect of the yield spread premium.

The tax service fee of $100 charged by Flagstar was for a contract to have the real estate tax records examined each year to make sure taxes have been paid and properly credited to the Michalowskis' property. Such a contract can be purchased for $48. The $110 document preparation fee charged by Flagstar but remitted to D.P.S. was the expense for filling out the note, the mortgage, and other related documents. The document preparation services were not performed by an attorney and D.P.S. is not a professional corporation consisting of attorneys authorized to practice law. It is the standard practice of CMC and Flagstar to charge a document preparation fee comparable to $110 when CMC or Flagstar arranges a loan.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows this court to dismiss a complaint that fails to state a claim upon which relief may be granted. In considering the merits of a motion made pursuant to Rule 12(b)(6), the well- plead allegations of the complaint must be accepted as true. *Turner/Ozanne v. Hyman/Power,* 111 F.3d 1312, 1319 (7th Cir.1997). In addition, all ambiguities will be construed in favor of the plaintiff. *Kelley v. Crosfield Catalysts,* 135 F.3d 1202, 1205 (7th Cir.1998). A court generally should only dismiss a complaint where it is clear that no relief could be granted with the allegations. *Hishon v. King & Spaulding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984). Additional facts submitted outside of the pleadings will be explicitly excluded and not considered, except those documents that are attached to the motion to dismiss, are referred to in the complaint and are central to the plaintiff's claims. *Levenstein v. Salafsky,* 164 F.3d 345, 347 (7th Cir.1998).

ANALYSIS

I. *Federal Claims*

A. *Count I--RESPA*

***3** Count I of the Michalowskis' second amended complaint alleges that Flagstar's payment of the yield spread premium to CMC on June 7, 2001 from the Michalowskis' mortgage loan proceeds violated the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.,* because the yield spread premium constituted an illegal fee received solely for CMC's referral of business and in exchange for CMC's success in persuading the Michalowskis to sign on to a loan at a higher interest rate than the base interest rate. Congress enacted RESPA to protect home buyers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). Specifically, § 2607(a) provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).

However, even if it is established that a referral fee has been paid, however, there is no violation of RESPA if the payment is compensation "for goods or facilities actually furnished or for services actually performed ... so long as a disclosure is made of the existence of such an arrangement to the person being referred ...." 12 U.S.C. § 2607(c)(2). In other words, it is perfectly legal under RESPA

for a lender to pay a mortgage broker for services the broker has performed in connection with a real estate transaction but it is illegal for a lender to pay a broker a referral fee for sending business the lender's way.

The legality of yield spread premium payments under the RESPA has been the subject of several federal lawsuits across the country. *See, e.g., Vargas v. Universal Mortgage Corp.,* 2001 WL 558045 (N .D. Ill., May 21, 2001); *Golon v. Ohio Savs. Bank,* 1999 WL 184401 (N.D.Ill. Mar. 29, 1999); *DeLeon v. Beneficial Constr. Co.,* 998 F.Supp. 859 (N.D.Ill.1998); *Hastings v. Fidelity Mortgage Decisions Corp.,* 984 F.Supp. 600 (N.D.Ill.1997). *See also Marbury v. Colonial Mortgage Co.,* 2001 WL 135719 (M.D.Ala. Jan. 12, 2001); *Schmitz v. Aegis Mortgage Corp.,* 48 F.Supp.2d 877 (D.Minn.1999); *Potchin v. Prudential Home Mortgage Co.,* 1999 WL 1814612 (E.D.N.Y. Nov. 12, 1999);. The general consensus, and the view endorsed by the Department of Housing and Urban Development ("HUD") is that yield spread premium payments are not *per se* illegal, but that certain unscrupulous lenders use the yield spread premium payment improperly as a means to compensate brokers for originating loans with higher interest rates. A 1999 HUD regulation suggests a two-part test to determine whether a yield spread premium is an illegal referral fee or a permissible fee for service rendered. *See* Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed.Reg. 10080 (1999) ("1999-1 Policy Statement"). This two-part test was confirmed by a 2001 HUD policy statement issued to clarify HUD's 1999- 1 Policy Statement. *See* Real Estate Settlement Procedures Act (RESPA) Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed.Reg. 53052 (2001). Under the two-step framework for analyzing the legality of lender payments to brokers set forth in the 1999- 1 and 2001-1 Policy Statements, this court is required to first consider "whether goods or facilities were actually furnished or services were actually performed for the compensation paid" and second, "whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." *See* 1999-1 Policy Statement, 64 Fed.Reg. at 10084; 2001-1 Policy Statement, 66 Fed.Reg. at 53054. The yield spread premium payment is to be factored in as one element of the broker's "total compensation" when evaluating the overall reasonableness of the compensation and the framework for evaluating the reasonableness of the total compensation for a particular transaction should be considered "in relation to price structures and practices in similar transactions and in similar markets." 1999-1 Policy Statement, 64 Fed.Reg. at 10084; 2001-1 Policy Statement, 66 Fed.Reg. at 53055.

***4** In support of their motions to dismiss, CMC and Flagstar argue that the Michalowskis allege no more than the existence of a yield spread premium payment and a conclusory assertion that the premium was in excess of reasonable compensation for services provided. CMC and Flagstar maintain that the Michalowskis fail to allege any facts regarding the relation between the total compensation provided to CMC and the price structures and practices in similar transactions and similar markets as required under HUD's 1999-1 and 2001-1 Policy Statements. In the second amended complaint, the Michalowskis allege that the yield spread premium paid by Flagstar to CMC was unreasonable and was simply for the referral of business, not for compensation for goods, facilities, or services performed, as CMC was already compensated for said functions by the payment of $800 out of the loan proceeds for the commitment and processing fees. This court finds that while the Michalowskis will ultimately be required to establish that the yield spread premium was paid merely for the referral of business and was not compensation for services performed by CMC, this is a factual dispute for which the resolution may depend on many factors such as the interest rate on the Michalowskis' mortgage, Michalowskis' credit histories, the number and kind of services CMC performed for Flagstar, whether CMC gave the Michalowskis the opportunity to consider products from different lenders, and whether CMC would receive the same compensation regardless of which lender's products were ultimately selected. *See Vargas v. Universal Mortgage Corp.,* 2001 558045 at *2 (N.D.Ill., May 21, 2001) (listing relevant factors). Because the legality of a yield spread premium is highly dependent on the facts of each case and because this court finds the Michalowskis have plead their count I claim in a manner sufficient to put CMC and Flagstar on notice of the RESPA

claim, the motion to dismiss the count I RESPA claim cannot be granted.

B. *Count VII--TILA*

Count VII alleges that CMC violated the Truth In Lending Act ("TILA"), 15 U.S.C. § 1638, and Regulation Z, 12 C.F.R. §§ 226.17-226.18, by issuing two TILA disclosures at the closing of the mortgage loan transaction without specifying which was the operative statement. Both of the relevant TILA statements the Michalowskis received at the closing are dated June 7, 2001 (Compl.Exs.G, H.). However, one of the TILA statements is marked as an estimate as provided for at the bottom of the form, (Compl.Ex. H), while the other TILA statement is not marked as an estimate. (Compl.Ex. G.) In the statement that is marked as an estimate, the box next to the label "means an estimate" is checked, as is the box next to the label "all dates and numerical disclosures except the late payment disclosures are estimates." (Compl.Ex. H). The Michalowskis only signed one statement, the statement that was *not* marked as an estimate, which consequently is the only operative statement. This court finds that CMC did not violate the TILA by providing the Michalowskis with one statement marked as an estimate and one statement signed as the operative TILA disclosure statement. Accordingly, this court dismisses count VII for failure to state a claim.

II. *State Law Claims*

***5** As a preliminary matter, this court will address Flagstar's argument that because Flagstar is a federally chartered savings bank regulated by the Office of Thrift Supervision ("OTS") under the Home Owners Loan Act ("HOLA"), all of the Michalowskis' state law claims against Flagstar are pre-empted. While Flagstar is correct in noting that part 560 of the OTS regulations entitled "Lending and Investment" provides that "OTS hereby occupies the entire field of lending regulation for federal savings associations," 12 C.F.R. § 560.2(a), this court finds that the Michalowskis' state law claims are not brought under state laws that "regulate lending." All of the state law claims allege fraudulent or tortious conduct by Flagstar. The Michalowskis do not maintain that the actual fees Flagstar charged are unlawful; rather, the Michalowskis challenge the methods through which Flagstar collected the fees, arguing that Flagstar knowingly overcharged and deceived the Michalowskis. Therefore, this court will not dismiss all of the Michalowskis' state law claims against Flagstar as pre-empted. The state law claims are discussed below.

A. *Counts II, V, VI--ICFA*

Count II alleges that CMC and Flagstar charged the Michalowskis and the putative class members a yield spread premium merely for the referral of business without providing full and complete disclosure of all material facts relating to this transaction, thereby receiving amounts in excess of reasonable compensation for services provided in violation of the Illinois Consumer Fraud Act ("ICFA"), 815 ILCS § 505/1. The Michalowskis contend that the conduct of CMC and Flagstar was deliberate, oppressive, corrupt and dishonest. Count V alleges that Flagstar engaged in unfair and deceptive acts and practices by charging the Michalowskis and the putative class members $100 for a tax service fee that could be had for $48, failing to identify the person to whom the $100 was disbursed, keeping or receiving back part of the $100 and stating on the HUD-1 form that the $100 was paid to Flagstar.

To show a violation of ICFA, a plaintiff must allege (1) a deceptive act or practice by defendants, (2) defendants' intent that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce. *See Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 501 675 N.E.2d 584, 593 (1996). Federal Rule of Civil Procedure 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). The heightened pleading standard imposed by Rule 9(b) applies to claims arising under the ICFA. *Petri v. Gatlin,* 997 F.Supp. 956, 973 (N.D.Ill.1997); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 501, 675 N.E.2d 584, 593 (Ill.1996). The Michalowskis, then, must "identi[f]y ... the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated." *Uni Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir.1992). In other words, the Michalowskis must plead the who, what, when, and where of the alleged fraud. *Id.*

*6 CMC and Flagstar argue that the Michalowskis fail to plead counts II and V with the necessary particularity. The purpose of Rule 9(b) is to "ensure that the party accused of fraud, a matter implying some degree of moral turpitude and often involving a 'wide variety of potential conduct,' is given adequate notice of the specific activity that the plaintiff claims constituted the fraud so that the accused party may file an effective responsive pleading." *Lachmund v. ADM Investor Services, Inc.*, 191 F.3d 777, 783 (7th Cir.1999). Here, the Michalowskis are not challenging a wide variety of potential conduct by CMC and Flagstar; instead, their allegations are limited to two very specific and distinct charges, the yield spread premium payment in count II and the tax service fee in count V. This court believes that the Michalowskis have adequately put CMC and Flagstar on notice as to what specific activities are alleged to be fraud.

CMC and Flagstar maintain next that counts II and V are nothing more than breach of contract claims, not valid claims under ICFA. Not every breach of contract constitutes a cause of action under ICFA. "[C]ourts have consistently resisted attempts by litigants to portray otherwise ordinary breach of contract claims as causes of action under the Act." *Lake County Grading Co. v. Advance Mechanical Contractors, Inc.*, 275 Ill.App. 452, 458, 654 N.E.2d 1109, 1115 (2d Dist.1995). Count II alleges that Flagstar paid CMC a referral fee to raise the Michalowskis' mortgage loan interest rate. Flagstar and CMC argue that the yield spread premium was disclosed on the HUD-1 settlement statement and signed by the Michalowskis and that therefore any payment of the premium is at most a breach of contract claim. This court disagrees. The Michalowskis do not assert that Flagstar and CMC failed to uphold their part of the contract with regard to the yield spread premium payment. The alleged fraudulent activity alleged was not the amount of the yield spread premium, but rather Flagstar's alleged deceptive act of paying CMC solely for arranging a higher interest rate on the Michalowskis' loan. Accordingly, this court finds that count II states a claim for a violation of ICFA.

As to count V, however, this court finds that the Michalowskis have simply alleged a breach of contract claim, not a claim under ICFA. Count V alleges that Flagstar charged the Michalowskis and others a $100 tax service fee that could be had for $48. The relevant contracts in this case include the note and the mortgage. (Compl.Ex. E, F.) The mortgage specifically authorizes the tax service charge the Michalowskis complain of, stating that "Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan." (Compl. Ex F at ¶ 4.) The note and the mortgage both provide that in the event the bank charges a fee in excess of that permitted under the law, that the overcharge will be reduced to the permitted limit and that any sums collected in excess will be refunded to the borrower. (Compl. Exs. E at ¶ 5, F at ¶ 14.) The Michalowskis argue that a business which imposes charges in excess of those permitted by consumer contracts engage in an unfair and deceptive practice. The core of the Michalowskis argument that Flagstar charged in excess of that permitted in the contract rests on the fact that the contract address the tax service charge. The contracts in this case specifically authorize the charging of the tax service fee and provides the remedy in the event the Michalowskis establish they were overcharged. Further, the allegation that Flagstar has also deceptively overcharged an unknown number of similarly situated "others" does not create an ICFA claim; it is merely an allegation that Flagstar has breached similar contracts with various other borrowers in the same position as the Michalowskis. Accordingly, this court dismisses count V of the second amended complaint.

*7 Count VI is entitled "Restitution" and is based upon an allegation that Flagstar unjustly enriched itself by overcharging the Michalowskis the tax service fee. Since the remedy of restitution for unjust enrichment is not available in cases where the claim is governed by a contract. *See F.H. Prince & Co. v. Towers Fin. Corp.*, 275 Ill.App.3d 792, 804-05, 656 N.E.2d 142, 151 (1st Dist.1995) ("Since the doctrine of unjust enrichment presents an implied or quasi-contract claim, where there is a specific contract which governs the relationship between the parties, the doctrine has no application."). Because this court finds that the alleged overcharging of the tax service fee in this case is governed by contract, this court appropriately dismisses count VI.

B. *Counts III and IV--Fiduciary Duty*

Count III alleges that CMC, as the Michalowskis' mortgage broker and agent, breached its fiduciary

duty to the Michalowskis by receiving money from Flagstar for increasing the loan interest rate to the Michalowskis' detriment without full disclosure of all material facts relating to this transaction. CMC maintains that the Michalowskis have failed to sufficiently plead the existence of an agency relationship. A fiduciary duty is "the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith- in fact to treat the principal as well as the agent would treat himself." *Lagen v. Balcor Co.,* 274 Ill.App.3d 11, 21, 653 N.E.2d 968, 975 (2d Dist.1995). Although courts may find a fiduciary relationship when one person solicits another to repose trust in his expertise, "[t]he fact that one party trusts the other is insufficient [to create a fiduciary relationship]. We trust most people with whom we choose to do business." *Id.* An agency relationship has two components: 1) the principal has the right to control the manner and method in which the agent performs work for her, and 2) the agent has the power to subject the principal to personal liability. *Knapp v. Hill,* 276 Ill.App.3d 376, 380, 657 N.E.2d 1068, 1071 (1st Dist.1995). While a mortgage broker is not always a borrower's agent, this court will not dismiss count III for failure to adequately plead agency. The existence of an agent/principal relationship rests on factual underpinnings and cannot be determined on a motion to dismiss. *See Hastings v. Fidelity Mortgage Decisions Corp.,* 984 F.Supp. 600, 614 (N.D.Ill.1997) (citing Restatement (Second) of Agency § 1 (1957) (Whether an agency is created "depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking."). This court finds that the Michalowskis have adequately alleged a breach of fiduciary duty in count III.

The Michalowskis allege in Count IV that Flagstar unlawfully induced CMC to breach its fiduciary duty to the Michalowskis in return for the yield spread payment. A third party may be held liable to a principal for a breach of fiduciary duty by another person if the third party: (1) knowingly participated in or induced the breach of duty, and (2) knowingly accepted the benefits resulting from the breach of duty. *See Hastings v. Fidelity Mortgage Decisions Corp.,* 984 F.Supp. 600, 614-15 (N.D.Ill.1997); *Regnery v. Meyers,* 287 Ill.App.3d 354, 679 N.E.2d 74, 80 (1997). The Michalowskis allege that Flagstar provided CMC with rate sheets which indicated the yield spread premium it would pay to CMC if the interest rate CMC obtained on the mortgage was above the par rate and that the yield spread premium Flagstar ultimately paid to CMC was linked to the actual increase in the Michalowskis' interest rate. This court finds that count IV adequately pleads a claim for inducement of breach of fiduciary duty to defeat a motion to dismiss.

C. *Counts VIII, IX, X--Unauthorized Practice of Law*

***8** In connection with the mortgage loan transaction, the Michalowskis were charged a document preparation fee of $110 for the filling out of the note, mortgage and related documents. The Michalowskis allege that Flagstar decided to impose the charge, CMC passed the charge on to the Michalowskis, and a third party document preparation services company, D.P.S., actually performed the work and received the $110. Count VIII alleges that Flagstar engaged in the **unauthorized practice** of law by charging a document preparation fee relating to the preparation of the note, mortgage, and related documents by D.P.S., a non- lawyer. Count IX alleges that Flagstar violated ICFA by charging the document preparation fee and failing to disclose that the services were not being performed by a lawyer. Finally, in count X, the Michalowskis seek restitution for the document preparation charge.

Illinois law on the "**unauthorized practice** of law" is not extensive. Illinois courts have not recognized a cause of action for the "**unauthorized practice** of law" unless the plaintiff alleged that defendants either had represented themselves as attorneys, or negligently provided services, thereby causing damages. *See Torres v. Fiol,* 110 Ill.App.3d 9, 11-12, 441 N.E.2d 1300, 1301 (1st Dist.1982) (plaintiffs could maintain a private cause of action for damages against a non-attorney for the unauthorized and negligent practice of law); *Rathke v. Lidisky,* 59 Ill.App.3d 560, 562, 375 N.E.2d 871, 872-73 (5th Dist.1978) (affirming dismissal of the **unauthorized practice** of law count because plaintiff did not allege negligence or that any of the defendants represented themselves to be attorneys such that they would be held to a higher duty of care). In this case, this court notes first that the Michalowskis do not allege that Flagstar represented

itself to be an attorney, nor do the Michalowskis allege that Flagstar negligently performed any legal service or mishandled the preparation of the loan documents. In fact, the Michalowskis do not even allege that Flagstar prepared the documents. The document preparation fee was remitted to a third party, D.P.S., a document preparation services company. Moreover, the Michalowskis do not allege that they suffered any damages from the actual preparation of the note and mortgage beyond the charging of the document preparation fee.

In support of their argument, the Michalowskis cite *Chicago Bar Ass'n v. Quinlan and Tyson, Inc.* for the general rule that "the drawing or filling in of blanks on deeds, mortgages or other legal instruments subsequently executed requires the peculiar skill of a lawyer and constitutes the practice of law." 34 Ill.2d 116, 122, 214 N.E.2d 771, 774 (1966). However, the Illinois Supreme Court in *Quinlan and Tyson,* suggested an exception to the general rule stated above that allows persons to engage in the activities that otherwise might constitute "practicing law" as long as the activities are incidental to the corporations main business, and as long as the persons does not "advise [ ] others for consideration, that this or that is the law, or that this form or that is the proper form to be used in a certain transaction ...." *See id.* Illinois courts interpreting this exception have drawn a distinction between cases where non-lawyers provide legal advice and services to third-parties and cases where non-lawyers perform services intended to benefit themselves. In *First Federal Savs. and Loan Assoc. v. Sadnick,* the Illinois court held that defendant First Federal Savings and Loan Association did not engage in the **unauthorized practice** of law in preparing mortgages, noting that the defendant did not provide legal advice to the mortgagors or prohibit the mortgagors from retaining an attorney, and concluding that the preparation of the mortgage was to benefit the defendant. 162 Ill.App.3d 581, 583, 515 N.E.2d 1354, 1356 (3d Dist.1987). The *Sadnick* court concluded that "First Federal was merely preparing the mortgage documents, this without more does not constitute the practice of law." *Id.; see also Johnson v. Pistakee Highlands Comm. Assoc.,* 72 Ill.App.3d 402, 404, 390 N.E .2d 640, 642 (2d Dist.1979) (holding that corporations could act for their own benefit as long as they do not hold themselves out as legal advisor or representative to anyone else).

***9** This court finds that the Michalowskis have not stated a claim under Illinois law for the **unauthorized practice** of law. First, the Michalowskis do not allege that Flagstar negligently prepared the mortgage documents and caused damages. Even if negligence and damages were properly alleged, this court finds that Flagstar was preparing the mortgage and note for its own benefit and incidental to Flagstar's main business, and that Flagstar did not hold itself out to be a legal advisor or representative. Accordingly, count VIII is dismissed for failure to state a claim. This court likewise dismisses count IX because the mere allegation that Flagstar did not disclose the fact that the document preparation services were not being performed by a lawyer, when there is no claim for the **unauthorized practice** of law, cannot constitute any deceptive act or practice for purposes of the ICFA. Finally, because the preparation of the documents was not the **unauthorized practice** of law, this court finds that the charging of the document preparation services was not inequitable conduct and therefore this court also dismisses count X, which seeks restitution for document preparation charge.

CONCLUSION

For all the above stated reasons, CMC's and Flagstar's motions to dismiss are GRANTED in part as to counts V, VI, VII, VIII, IX, and X, and DENIED in part as to counts I, II, III, and IV. Accordingly, counts V, VI, VII, VIII, IX and X are dismissed with prejudice for failure to state a claim. The Michalowskis are ordered to file an amended complaint consistent with this opinion by February 7, 2002. CMC's and Flagstar's answer is to be filed on or before February 18, 2002. The parties are urged to discuss settlement, conference pursuant to Rule 26(f), file a joint Form 35 by February 22, 2002, and report on the status of the case at 9:00 a.m. on February 26, 2002.

END OF DOCUMENT

B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

RONALD CORTAMILLA &
NITTAYAP CORTAMILLA
(PLAINTIFFS)

v.

HEARTLAND MORTGAGE CENTER P
OLD KENT MORTGAGE CO.
(DEF)

No. 01CH 17780

Calendar 10

ORDER

This cause coming on for ruling on Defendant's 2-615 motion to dismiss Plaintiff's complaint, the Court having considered the memoranda and the arguments of counsel, and the Court having prepared a written Memorandum Opinion dated August 27, 2002, a copy of which is attached,

IT IS HEREBY ORDERED that the Defendant's 2-615 motion to dismiss is granted and Plaintiff's Complaint is dismissed with prejudice.

Enter:

JUDGE RICHARD A. SIEBEL

AUG 27 2002

Circuit Court - 1778

Richard A. Siebel - 1778

Dated: August 27, 2002

MEMORANDUM OPINION – 2-615

Numerous class action lawsuits have been filed in the Circuit Court of Cook alleging that the practice by lending corporations of charging a "document preparation fee" for the preparation of mortgage loan documents constitutes the unauthorized practice of law. At last count forty-five such lawsuits (the "UPL cases") are pending before this Court. The plaintiffs in the UPL cases have alleged various causes of action against the defendant lending corporations including unauthorized practice of law, money had and received, unjust enrichment, and violation of the Illinois Consumer Fraud Act and the Michigan Consumer Protection Act. The defendants are not professional corporations and are not licensed to practice law.

In approximately thirty-one of the UPL cases the defendants have filed motions to dismiss the plaintiffs' claims pursuant to 735 ILCS 5/2-615. A Section 2-615 motion to dismiss attacks the deficiency of the pleading. F.H. Prince & Co., Inc. v. Towers Financial Corp., 275 Ill. App. 3d 792, 797 (1st Dist. 1995). A Section 2-615 motion admits all well-pleaded facts and reasonable inferences that could be drawn from those facts, but does not admit conclusions of law or conclusions of fact unsupported by allegations of specific facts. Talbert v. Home Savings of America, 265 Ill. App. 3d 376, 379 (1st Dist. 1994). Under Section 2-615, if it is clear that no set of facts could be proved under the pleadings which would entitle the pleader to relief, then the complaint should be dismissed. Summers v. Village of Durand, 267 Ill. App. 3d 767, 769 (2d Dist. 1994).

The defendants advance two primary arguments for why the plaintiffs' claims should be dismissed. The defendants argue that 1) the plaintiffs cannot allege a private

cause of action for the defendants' alleged unauthorized practice of law; and 2) that the defendants' conduct does not constitute the unauthorized practice of law. The defendants argue that the plaintiffs' claims must be dismissed because there exists no private right of action under Illinois law for the recovery of money to remedy the unauthorized practice of law. Rathke v. Lidisky, 59 Ill. App. 3d 560 (5th Dist. 1978). The defendants also argue that the preparation by a mortgage company of mortgage documents incidental to its business transactions and for its own purposes does not constitute the unauthorized practice of law. First Federal Savings & Loan v. Sadnick, 162 Ill. App. 3d 581 (3rd Dist. 1987). The defendants further contend that the fact that the plaintiffs paid a fee for these services does not transform the defendants' activity into the practice of law because the defendants did not render any legal advice.

The plaintiffs respond that they are not seeking damages for the unauthorized practice of law, but rather they are seeking restitution and disgorgement of the fees as the result of the defendants unauthorized practice of law. The plaintiffs argue that their claims have been properly pled in that they have alleged that the selection and preparation of documents affecting title to real estate constitutes the practice of law, particularly when a fee is charged. The plaintiffs contend that the filling in of blanks on deeds, mortgages and other legal instruments, subsequently executed, constitutes the practice of law, citing Chicago Bar Association v. Quinlan & Tyson, 34 Ill. 2d 116 (1966). The plaintiffs also argue that they have properly alleged fraud in that they have alleged that the defendants failed to disclose that they were not authorized to perform legal services and charge fees for those services.

The Court will first address the issue of whether the plaintiffs have standing to raise these claims based on the defendants' alleged unauthorized practice of law. Standing is typically raised as an affirmative matter which is resolved on a 2-619 motion to dismiss or on a motion for summary judgment. Greer v. Illinois Housing Development Authority, 122 Ill. 2d 462 (1988). Most of the defendants have failed to raise the issue of standing in a 2-619 motion to dismiss. However, it is apparent on the face of the complaints that the sole basis for the various plaintiffs' claims is the alleged unauthorized practice of law of the defendant lending corporations. A section 2-619 motion raises certain defects or defenses and poses the question of whether the defendant is entitled to judgment as a matter of law. If the grounds for such a motion do not appear on the face of the complaint, the motion must be supported by affidavit. 735 ILCS 5/2-619(a). When, however, the only grounds for a section 2-619 motion appear on the face of the complaint, the motion falls "within the area of confluence" between section 2-615 and section 2-619 and the appropriate method for reaching the defect is a section 2-615 motion. Storm & Associates v. Cuculich, 298 Ill. App. 3d 1040 (1st Dist. 1998). The issue of whether the plaintiffs have a private right of action to seek a remedy for the defendants' alleged unauthorized practice of law was fully briefed and argued by the parties.

The practice of law in Illinois is governed by the Illinois Attorney Act, 705 ILCS 205/0.01, *et seq.* The Attorney Act provides that "any person practicing, charging or receiving fees for legal services for legal fees within this State, either directly or indirectly, without being licensed to practice as herein required, is guilty of contempt of court and shall be punished accordingly." 705 ILCS 205/1. In terms of standing, it has

long been the law in Illinois that that attorneys and bar associations, i.e., licensed members of the legal profession, are the appropriate parties with standing to bring actions for the unauthorized practice of law and that an injunction to restrain such unauthorized practice is the appropriate remedy in such actions. Smith v. Illinois Adjustment Finance Co., 326 Ill. App. 654 (2nd Dist. 1945). See also Mallen v. Myinjuryclaim.com Corporation, 329 Ill. App. 3d 953 (1st Dist. 2002), which holds that attorneys and law firms have standing to pursue an action for the unauthorized practice of law. The Plaintiffs lack standing to bring these claims

The defendants also contend that the plaintiffs' claims must be dismissed because there is no private cause of action under Illinois law for the recovery of money to remedy the unauthorized practice of law. Rathke v. Lidisky, 59 Ill. App. 3d 560 (5th Dist. 1978). The basis for the Appellate Court's holding in Rathke was that the Illinois Attorney Act, upon which the plaintiff's claims were based, did not provide within its remedies an action for damages. The plaintiffs seek both actual and punitive damages, which Rathke explicitly provides are not recoverable in such actions. The proper remedy is injunction. Mallen v. Myinjuryclaim.com Corporation, 329 Ill. App. 3d 953 (1st Dist. 2002). The plaintiffs do not allege that the defendants rendered any legal advice to plaintiffs or that the defendants misrepresented to plaintiffs that they were attorneys licensed to render legal services. In addition, as in Rathke, the plaintiffs here do not allege any other negligent or fraudulent conduct, or other independently actionable conduct that would give rise to a right of action on the part of the plaintiffs, nor do the plaintiffs allege that they suffered any damages as a result of the defendants' conduct.

The defendants also argue that the preparation of a note and mortgage in connection with the plaintiffs' mortgage loans does not constitute the unauthorized practice of law. The plaintiffs argue that defendants' conduct constitutes the practice of law based on Chicago Bar Association v. Quinlan & Tyson, 34 Ill. 2d 116 (1966). In Quinlan & Tyson, the Supreme Court stated that the general rule that the "drawing or filing of blanks on deeds mortgages or other legal instruments subsequently executed requires peculiar skill of a lawyer and constitutes the practice of law. However, the Supreme Court in Quinlan & Tyson also suggested that an exception exists to this general rule which allows persons to engage in activities that otherwise might constitute "practicing law" as long as the activities are incidental to the corporation's main business.

The issue of whether the conduct of the defendants in the cases *sub judice* constitutes the practice of law, or is merely incidental to the business of mortgage lending, has been specifically addressed in the case of First Federal Savings & Loan Association v. Sadnick, 162 Ill. App. 3d 581 (3rd Dist. 1987). In Sadnick, the Appellate Court, recognizing the exception articulated by the Supreme Court in Quinlan & Tyson, held that a mortgage lending corporation's conduct in preparing mortgage documents did not constitute the practice of law because such conduct was incidental to the business of providing mortgage loans. Sadnick held that the lender's conduct did not constitute the practice of law because the lender was acting for its own benefit, because it did not provide legal advice to the borrower, and because it did not hold itself out as a legal advisor or representative.

The plaintiffs in the cases *sub judice* do not allege that the defendants provided plaintiffs with any legal advice or that the defendants misrepresented that they were

attorneys licensed to render legal services. The plaintiffs do not allege that the defendants engaged in any conduct other than that which is incidental to the business of mortgage lending or that the defendants deprived the plaintiffs of an opportunity to have the note and mortgage documents reviewed by an attorney. As in Sadnick, following the holding in Quinlan & Tyson, the defendants' conduct of preparing notes and mortgages in connection with plaintiffs' mortgage loans does not constitute the unauthorized practice of law. The Court finds that there is no set of facts which the plaintiffs might plead and prove which would entitle them to any relief.

By separate order the motions to dismiss will be granted and the plaintiffs' complaints will be dismissed with prejudice.

JUDGE RICHARD A. SIEBEL

Enter: AUG 27 2002

Circuit Court - 1778

Richard A. Siebel – 1778

Dated: August 27, 2002

C

IN THE CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

WILLARD J. KING, JR. and SHEILA KING, Plaintiffs, vs. FIRST CAPITAL FINANCIAL SERVICES CORP., Defendant.	)	No. 01L-189 Hon. Lori R. Lefstein

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY GENERAL DIVISION

JUN 25 2002

Lisa L. Bierman
Clerk of the Circuit Court

ORDER

This cause coming on to be heard on First Capital Financial Services Corp.'s ("FCF") Motion for Rule 308 Findings, Plaintiffs having posed no objection to the Motion and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. The Court finds, pursuant to Supreme Court Rule 308(a), that this Court's April 30, 2002 Order (the "Order") denying FCF's motion to dismiss Counts III and IV of Plaintiffs' Complaint involves questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation. The questions of law involved are (1) whether a lender which prepares documents for use in loan transactions in which the lender is involved, and charges the borrower for the preparation of those documents, is engaged in the unauthorized practice of law, and (2) assuming arguendo that the answer to Question No. 1 is "yes," whether a private cause of action exists for the lender's unauthorized practice of law.

2. All proceedings in this action are stayed until the Appellate Court rules on FCF's Application for Leave to Appeal and, if the Application for Leave to Appeal is granted, until the Appellate Court rules on the merits of the appeal. Nothing in this order, however, shall affect Plaintiffs' ability to assert any claims or defenses against parties other that FCF in other litigation.

DATED: June 25 2002

ENTER:

The Honorable Lori R. Lefstein

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